

advantages of TCI should it choose to utilize a specific technology used by TCI. However, it also contracts with suppliers not used by TCI for fiber and distribution and other plant equipment.

TCI has no guaranteed "clawback" rights with respect to acquiring the remaining 50 percent of the equity in LCI. TCI's only right is that if LCI shareholders choose to sell their shares, they must be offered to TCI first.

### **C. Implementation of The Managerial Control Test**

Implementation of a managerial control attribution test should be simple to administer. The party without managerial control (TCI in the ventures described above) would provide a written certification to the Commission that the terms of the particular venture satisfied the Commission's control criteria (see below) and that it retained no authority beyond those fundamental minority protections found acceptable by the Commission.

The criteria checklist for certifying that a party does not have managerial control would be as follows:

- cannot dictate programming decisions;
- does not control a majority of the governing board or committee;
- does not prepare the operating or capital budget (but can review the budget prepared by the managing partner);
- does not control personnel matters;
- cannot dictate use of particular technology; and
- does not have the unilateral right to acquire a controlling interest in the venture.

If the party without managerial control could so certify, the Companies submit that that party should not be attributed with any of the subscribers which are part of the joint venture. If,

however, an entity cannot make this certification in a particular venture, or its certification is rejected, as long as it owns 50% or less of the venture and itself does not have managerial control, the entity should only be attributed with its proportional share of the venture's subscribers.

## **II. ANY HORIZONTAL OWNERSHIP LIMIT SHOULD BE BASED ON TOTAL MVPD SUBSCRIBERS AND NOT ON CABLE HOMES PASSED.**

In the FNPRM, the Commission seeks comment on whether, in calculating a cable MSO's market share pursuant to the horizontal ownership rules, all MVPDs in the market should be taken into account and not just cable operators, as well as whether the rules should be changed to count actual subscribers rather than homes passed.<sup>19</sup> Specifically, the Commission proposes to calculate a cable operator's market share by counting all of the operator's cable subscribers plus its non-cable MVPD subscribers as part of the numerator, with the denominator consisting of the total number of MVPD subscribers (both cable and non-cable) nationwide.<sup>20</sup> The Companies agree that the denominator should consist of the total number of MVPD subscribers nationwide, but that the numerator must consist solely of a cable operator's *cable* subscribers.

The statute specifically directs the Commission to "prescribe rules and regulations establishing reasonable limits on the number of *cable subscribers* a person is authorized to reach *through cable systems* . . . ."<sup>21</sup> The statute clearly anticipates placing limits on the number of cable subscribers any given entity can serve through its cable systems and thus, the number of cable subscribers to whom the cable operator could theoretically block access *vis-a-vis* independent

---

<sup>19</sup>FNPRM at ¶ 79.

<sup>20</sup>*Id.*

<sup>21</sup>47 U.S.C. § 533(f)(1)(A) (emphasis added).

programmers. The statute does not contemplate limiting the number of non-cable MVPD subscribers served by *any* entity, including entities that also operate cable systems. Thus, in calculating any particular cable operator's compliance with the horizontal ownership limits, the numerator must consist of the operator's cable subscribers only, and not its non-cable MVPD subscribers.

The denominator, however, must consist of all MVPD subscribers (both cable and non-cable) nationwide in order to reflect marketplace realities. Initially, as the Commission noted in its most recent annual competition report,

In assessing the impact that national concentration may have in the MVPD programming market, we believe that it is appropriate to consider the presence of all MVPDs and MVPD subscribers in national concentration figures, and not just cable MSOs and cable subscribers. As non-cable MVPD subscribership increases, the significance of DBS, MMDS and SMATV operators in the MVPD program purchasing market also increases.<sup>22</sup>

Such an approach recognizes that non-cable MVPDs provide an alternative programming distribution outlet for video programmers, and that as the number of subscribers served by such non-cable MVPDs increases, the ability of a cable operator to block distribution of any programming service will greatly lessen.

It is undeniable that cable operators face substantially greater competition today than just four years ago, particularly from DBS. As reported in the Fourth Annual Competition Report, DBS subscribership has skyrocketed from less than 70,000 in December 1993 to over 5,000,000 in June 1997 and cable subscribers have dropped from 94.89% of all MVPD subscribers in

---

<sup>22</sup>Fourth Annual Report, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, FCC 97-423 at ¶ 150 (rel. Jan. 13, 1998) ("Fourth Annual Competition Report").

December 1993 to 87.10% in June 1997.<sup>23</sup> A recent trade press article indicates that current DBS subscribership has now grown to 7.3 million subscribers nationwide.<sup>24</sup> Despite these drastic competitive changes, the current horizontal ownership rules focus exclusively on the percentage of cable households passed by a particular cable operator without accounting for the fact that total cable households represent a steadily and irreversibly declining percentage of total MVPD households. The current rules are akin to a rule which would prohibit any of the big three U.S. automakers from selling more than 30% of all cars made by U.S. automakers, without accounting for the fact that cars made by the big three U.S. automakers constitute a declining percentage of all new cars sold in the U.S. Accordingly, both cable and non-cable MVPD penetration must be factored into any calculation of national concentration figures.

In addition, the denominator for purposes of calculating compliance with the horizontal ownership cap should be based on all MVPD subscribers and not be framed in terms of "homes passed." Homes passed data for both cable and non-cable MVPDs is not readily available and is also unreliable, making it virtually impossible for parties to evaluate their compliance with the horizontal ownership limits. On the other hand, total MVPD subscriber figures are published annually in the Commission's competition reports, providing a single, readily accessible number that all parties can use to plug into the equation when calculating their compliance with the horizontal ownership limits.<sup>25</sup> Moreover, a homes passed test penalizes cable operators with low

---

<sup>23</sup>*Id.* at Appendix E, Table E-1.

<sup>24</sup>Monica Hogan, "DBS Sales Heat Up In June," Multichannel News, July 20, 1998, at 3.

<sup>25</sup>For example, the Fourth Annual Competition Report calculates a total of 73,646,970 MVPD subscribers in the U.S. as of June 1997. Fourth Annual Competition Report at Appendix E, Table

penetration due to competition from other MVPDs. The Commission recognizes in the FNPRM that “[a]s alternative MVPDs continue to grow in the future, the number of homes passed by a cable operator may become an increasingly inaccurate measure of its actual subscribership and thus of its actual market power.”<sup>26</sup>

### **III. THE CURRENT 30% HORIZONTAL OWNERSHIP CAP IS TOO LOW.**

The Commission seeks comment as to “whether 30% remains the appropriate horizontal ownership limit in light of evolving market conditions.”<sup>27</sup> The Companies respectfully submit that the 30% limit was set too low in 1993 and that changing market conditions and intervening changes in analogous FCC rules demonstrate that the 30% limit is particularly inappropriate five years later. As noted earlier, the main policy goal of the horizontal ownership rules is to ensure that large cable MSOs cannot block the development of independent programmers. However, independent programming services have continued to thrive even as, for example, TCI has approached the current 30% horizontal ownership cap.

The ability of independent programming services to compete with their vertically integrated counterparts is demonstrated by statistical evidence reflecting the overwhelming growth and popularity of such independent programming services in recent years. First, as indicated by Table A below, the number of existing independent programming services not only has grown steadily since 1994, but also at a higher rate than cable MSO-affiliated programming services:

---

E-1.

<sup>26</sup>FNPRM at ¶ 84.

<sup>27</sup>FNPRM at ¶ 78.

**Table A: Vertical Integration of Existing Programming Services 1994-1997<sup>28</sup>**

<b>Year</b>	<b>Total Program. Services</b>	<b>Total Vertically Integrated Services</b>	<b>Total Independent Services</b>	<b>Percent Vertically Integrated Services</b>	<b>Percent Independent Services</b>
1994	106	56	50	53%	47%
1995	129	66	63	51%	49%
1996	147	67	80	46%	54%
1997	172	68	104	40%	60%

In addition, as demonstrated by Table B below, since 1994 the proposed launches of independent programming services have occupied an increasing percentage of total new programming launches as compared to launches of vertically integrated programming services:

---

<sup>28</sup>See Fourth Annual Competition Report at ¶ 158.

**Table B: Vertical Integration of Proposed Launches 1994-1997<sup>29</sup>**

<b>Year</b>	<b>Total Proposed Launches</b>	<b>Total MSO- Affiliated Proposed Launches</b>	<b>Total Non- Affiliated Proposed Launches</b>	<b>Percent MSO- Affiliated Proposed Launches</b>	<b>Percent Non- Affiliated Proposed Launches</b>
1994	98	30	68	31%	69%
1995	80	18	62	22%	78%
1996	63	10	53	16%	84%
1997	77	5	72	6%	94%

Finally, as indicated by Tables C and D below, the relative popularity of independent programming services, measured by both the number of subscribers and by prime time rating, has increased steadily since 1994:

---

<sup>29</sup>See Fourth Annual Competition Report at Appendix F, Table F-3, Table F-4; Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, 12 FCC Rcd 4358 at Appendix G, Table 3, Table 4 (rel. Jan. 2, 1997) ("Third Annual Competition Report"); Second Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, 11 FCC Rcd 2060 at Appendix H, Table 3, Table 4 (rel. Dec. 11, 1995) ("Second Annual Competition Report"); First Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48, 9 FCC Rcd 7442 at Appendix G, Table 5 (rel. Sept. 28, 1994) ("First Competition Report").

**Table C: Vertical Integration of Top 25 Programming Services by Number of Subscribers<sup>30</sup>**

Year	Total Vertically Integrated Services	Total Independent Services
1994	17	8
1995	17	8
1996	12	13
1997	10	15

**Table D: Vertical Integration of Top 15 Programming Services by Prime-Time Rating<sup>31</sup>**

Year	Total Vertically Integrated Services	Total Independent Services
1994	12	3
1995	11	4
1996	8	7
1997	7	8

The overwhelming success of independently-owned programming services, as demonstrated by these statistics, suggests that such services face little difficulty in entering and succeeding in today's video programming competitive environment.

As Table A demonstrates, while both the number of existing vertically integrated programming services and independent programming services have grown since 1994, the number of independent programming services has grown at a significantly higher rate in that time period. The

---

<sup>30</sup>See Fourth Annual Competition Report at Appendix F, Table F-6; Third Annual Competition Report at Appendix G, Table 6; Second Annual Competition Report at Appendix H, Table 6; First Competition Report at Appendix G, Table 7.

<sup>31</sup>See Fourth Annual Competition Report at Appendix F, Table F-7; Third Annual Competition Report at Appendix G, Table 7; Second Annual Competition Report at Appendix H, Table 7; First Competition Report at Appendix G, Table 8.



numerical totals indicate that while the total number of vertically integrated programming services has remained at virtually the same amount each year since 1995, the total number of independent programming services grew by an average of twenty services per year in the same period. Thus, the percentage figures shown in Table A reflect that, in recent years, the percentage of total programming services offered by independent parties has increased steadily since 1994 while the percentage of programming services offered by cable operators has accordingly declined. The number of existing independent programming services has outnumbered those affiliated with cable operators since 1996.

Since 1994, the total number of proposed launches for new programming services each year has consisted predominantly of launches by independent parties. As Table B reflects, the number of proposed launches by independent parties has not only consistently exceeded the number of proposed launches by cable MSOs, but it has done so by an increasing percentage of the total proposed launches each year. This trend is best exemplified by the data regarding proposed launches of new programming services in 1997. In that year, nearly all such proposed launches were by independent parties. The dramatic increase in the percentage of total proposed launches by independent parties indicates favorable market conditions leading to such parties investing time and money into the initial steps of launching programming services. This would not be the case if aspiring independent programmers anticipated being forced from the market by cable operators' preferences for their own programming.

The fact that independent programming services have continued to thrive even as one cable company approaches the 30% horizontal ownership limit serves as real world evidence that the 30% cap is simply too low and over inclusive as a horizontal concentration measure. Indeed, antitrust law recognizes that a single entity cannot exercise undue market power if it controls less

than 50% of the relevant market.<sup>32</sup> In a case involving a market foreclosure claim based on a tying theory, the U.S. Supreme Court held that 30% control of the relevant market in the tying product was insufficient to support a finding of adverse effect on the "market as a whole" and that there was no "adverse effect on competition" upon which to "make out a case under the antitrust laws."<sup>33</sup> Clearly, the current 30% horizontal ownership limit is not supported either by current market realities or by standard antitrust analysis.

Moreover, after the Commission adopted the current 30% horizontal cable ownership cap in 1993, Congress passed the Telecommunications Act of 1996, establishing a new horizontal ownership limit for television stations of 35% of television households nationwide (up 10% from the previous 25% limit).<sup>34</sup> At the time of the adoption of the current horizontal cable ownership limit, the Commission noted that the broadcast ownership rules presented issues which were "relevant to addressing the concerns at issue in this proceeding relating to the ability of cable operators to unduly influence the programming marketplace."<sup>35</sup> Even while finding that the broadcast ownership context was analogous to the cable ownership context, the Commission decided to set the 30% cable horizontal ownership limit at an amount *greater* than the 25% broadcast horizontal ownership limit in existence at the time. In light of Congressional recognition through its passage of Section 202(c)(1)(B) of the Telecommunications Act of 1996

---

<sup>32</sup>*See, e.g., United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742 (2d Cir. 1989); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co. Inc.*, 614 F.2d 832, 841 (2d Cir. 1980).

<sup>33</sup>*Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984).

<sup>34</sup>Pub. L. 104-104, 110 Stat. 56 (1996), § 202(c)(1)(B).

<sup>35</sup>*Second Report and Order* *supra*, at ¶ 35.

that 35% does not represent undue concentration in the context of television station ownership, at the very least, the Commission must raise the cable horizontal ownership limit to match the broadcast horizontal ownership limit.<sup>36</sup>

A cable horizontal ownership limit that would allow a cable operator to reach up to 35% of all MVPD subscribers nationwide, as proposed herein, would in fact result in programmers having access to a larger number of MVPD subscribers today than such programmers could have reached in 1993 under a 30% horizontal ownership limit. The Fourth Annual Competition Report reports that, as of December 1993, there were 60.3 million MVPD subscribers nationwide, while as of June 1997, there were 73.7 million MVPD subscribers nationwide.<sup>37</sup> In 1993, the year the Commission established a 30% horizontal ownership limit, a programmer would have had access to at least 70% of the nation's non-largest MSO MVPD subscribers under the horizontal concentration formula proposed herein, or 42.21 million MVPD subscribers. In 1997, assuming a 35% horizontal ownership limit, calculated as proposed herein, a programmer would have access to at least 65% of the nation's non-largest MSO MVPD subscribers, or 47.9 million MVPD subscribers -- an *increase* of 5.7 million available MVPD subscribers over that available in 1993 under a more restrictive horizontal ownership limit. Obviously, as noted above, the robust MVPD marketplace, with its increasing subscribership and increasing success of competitors to cable,

---

<sup>36</sup>Even the 35% broadcast horizontal ownership limit is under attack. According to trade press reports, News Corp. will shortly present the Commission with a proposal to allow broadcasters to exceed the 35% limit by as much as 10% if the additional 10% reach consists of minority-owned stations. Chris McConnell, "Minority Ownership: Fox's 45% Solution," Broadcasting and Cable, July 6, 1997, at 6.

<sup>37</sup>Fourth Annual Competition Report at Appendix E, Table E-1.

results in ever-increasing numbers of potential video programming distribution outlets. The time is now ripe for the Commission to recognize that the cable horizontal ownership limit must be raised regularly to account for this increase in potential video programming audience nationwide.

**IV. IF THE CURRENT HORIZONTAL OWNERSHIP RULES ARE NOT CHANGED, THE COMMISSION MAY HAVE TO ADDRESS GRANDFATHERING ISSUES.**

If the Commission does not seize this opportunity to set the horizontal ownership limit at a more realistic level and to recognize that attribution for purposes of the horizontal ownership rules should be based upon managerial control, it may have to address grandfathering issues. As the Commission is aware, several cable operators, including the Companies, are in various stages of forming joint ventures with TCI in which TCI will cede managerial control over the cable systems it contributes to each joint venture. If, however, such systems are still attributed to TCI for purposes of the horizontal ownership rules, it seems likely that the current 30% limit will be breached.

Clearly, business as usual must continue during the lengthy appeal process surrounding the horizontal ownership rules. Given the current uncertainty surrounding the basic constitutional validity of the horizontal ownership rules, as well as the uncertainty regarding the final shape such rules will take if they are ultimately upheld and the current stay is lifted, parties to pending transactions have attempted to structure their transactions in such a way as to avoid implicating the concerns underlying any horizontal ownership limits. Thus, as noted above, parties entering into joint ventures with TCI have ensured that TCI will not exercise managerial control over the newly-formed joint venture entities.

Accordingly, the Companies respectfully submit that any transactions under contract prior to the release of the FNPRM should be grandfathered. Any grandfathered TCI joint venture which is not subject to TCI's managerial control should be free to continue to grow either through limited acquisition or internal growth. Thus, if the consummation of any such grandfathered TCI joint venture would cause TCI to exceed the 30% horizontal ownership limit (or even a slightly higher cap), the grandfathered joint venture would still be allowed to add subscribers in the normal course of business to its existing cable systems. Moreover, the grandfathered joint venture should be free to acquire additional cable systems from third parties in order to further the efficiencies and consumer benefits realized by the geographic clustering which the joint ventures were formed to create. Such an allowance is necessary in order to comply with the congressional mandate that the Commission must, in prescribing horizontal ownership regulations, "account for any efficiencies and other benefits that might be gained through increased ownership or control."<sup>38</sup>

## CONCLUSION

Current marketplace realities dictate that several changes must be made to the current horizontal ownership rules. First, attribution for purposes of determining compliance with horizontal ownership limits should be based on managerial control since it is the entity that actually makes the programming decisions with respect to any given cable system that will have an impact on the degree of distribution of independent programming services. Moreover, if the goal is to ensure that the development of independent programmers is not blocked, the

Commission should encourage, not penalize, transactions which will result in an overall reduction in subscribers subject to TCI's managerial control.

Further, due to increasing competition from non-cable MVPDs, any horizontal ownership limit must account for the increasing market power of such non-cable MVPDs and the alternative programming distribution outlets they provide. The horizontal ownership cap should also be based on all MVPD subscribers and not framed in terms of cable homes passed due to the fact that homes passed information is unreliable and difficult to obtain, as well as the fact that any test based on homes passed penalizes cable operators with low penetration due to competition from other MVPDs. A cable operator's horizontal ownership percentage thus should be calculated by including all of the operator's cable subscribers in the numerator and by including all MVPD subscribers nationwide in the denominator.

Finally, the thriving marketplace for independent programming services, traditional antitrust analysis and analogous FCC broadcast ownership limits all dictate that the current 30%

horizontal ownership cap should be raised to at least 35 %. All of these suggested revisions to the horizontal ownership limits will better reflect marketplace realities while still affording appropriate protection to independent programming services.


Respectfully submitted,

**ADELPHIA COMMUNICATIONS  
CORPORATION**

**FALCON HOLDING GROUP, L.P.**

**INSIGHT COMMUNICATIONS  
COMPANY, L.P.**

**LENFEST COMMUNICATIONS, INC.**

By:   
Aaron I. Fleischman  
Charles S. Walsh  
Stuart F. Feldstein  
Regina F. Pace

Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 939-7900

Their Attorneys

Date: August 14, 1998  
84503